IN THE

Supreme Court of the United States

October Term, 1950

No. 373

FRED STROBLE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S OPPOSING BRIEF.

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RESPONDENT'S OPPOSING BRIEF.

Statement of Case.

Petitioner was charged by an information filed in the Superior Court of the County of Los Angeles, State of California, with the murder of Linda Joyce Glucoft, a six-year-old child. To this charge petitioner pleaded not guilty and not guilty by reason of insanity. He was represented by the Public Defender. The trial resulted in a verdict by the jury of murder in the first degree on petitioner's plea of not guilty. He then waived trial by jury on his plea of not guilty by reason of insanity and was tried by the Court and was adjudged sane. The death penalty was thereafter imposed. The Supreme Court of California affirmed the judgment. (*People v. Stroble*, 36 A. C. 578, 226 P. 2d 330.)

Jurisdiction.

Petitioner seeks to have the judgment of the Supreme Court of California reviewed by this Honorable Court upon his claim that there are rights, privileges and immunities involved herein under the Constitution of the United States.

The matters specially set forth in his petition for a writ of certiorari are that at his trial and over objection the prosecution put in evidence a confession obtained by physical abuse and psychological torture; that he was denied a fair trial by the conduct of the district attorney who, petitioner asserts, actively solicited and enlisted the aid of the press to create a trial by newspaper; that the trial judge allowed the televising of portions of the trial and the taking of news photographs during the trial; that he was deprived of counsel of his choice during the trial; that the trial court failed to take evidence on petitioner's plea of not guilty by reason of insanity, and that petitioner was forced to trial on an information which was based solely upon an involuntary confession.

Statement of Facts.

Linda's body was found behind an incinerator in the rear yard of a residence occupied by petitioner's daughter and son-in-law, Mr. and Mrs. Hausman, and their child, Rochelle. The body was wrapped in a blanket and covered with several cardboard boxes. [Rep. Tr. pp. 50, 51, 52, 55, 56.] An axe and a knife were near the body and the child's panties were in the incinerator. [Rep. Tr. pp. 56, 57, 59, 60.] A necktie was wound twice around her neck. [Rep. Tr. p. 71.] There were multiple wounds on the right side of her head and abrasions on the temporal region. [Rep. Tr. p. 73.] Behind the right ear there was a laceration, also on the back of her head. [Rep. Tr. pp. 74, 80.] Into the neck between the sixth and seventh cervical vertebrae there was a deep laceration which lacerated the spinal cord. [Rep. Tr. p. 82.]

It was the opinion of the autopsy surgeon that the immediate cause of death was asphyxia due to strangulation [Rep. Tr. p. 68], that the child was alive when the marks of violence were inflicted on the child's forehead and the two punctuate wounds were made in her chest and one in the back, but that she was dying when she suffered the six head fractures and was dead when she received the wound in back of the neck that severed the spinal cord. [Rep. Tr. pp. 100-103.] It was also the opinion of the autopsy surgeon that the abrasions on the child's back could have been caused by a glancing blow from the metal end of the axe [People's Exhibit 9], that the two semicircular lacerations on the child's temple could have been caused with a weapon similar to the ball peen hammer [People's Exhibit 8]; that the wound in the back of the neck which severed the spinal column, could have been inflicted with a weapon similar to the knife [People's

Exhibit 6], and that the two puncture wounds on the child's chest and the one on her back, could have been caused by an ice pick such as People's Exhibit 7. [Rep. Tr. pp. 97-99.]

Linda and Rochelle were playmates and lived across the street from each other. [Rep. Tr. pp. 21, 30, 31.] On the afternoon of November 14, 1949, Linda went to play with Rochelle, but Rochelle had gone to a party with her mother, leaving petitioner at home. [Rep. Tr. pp. 15, 17, 30, 31.] Petitioner did not live with his daughter, but often visited with her, staying a couple of days on each visit. Petitioner knew Linda and they were seen together on occasions. [Rep. Tr. p. 27.] When Mrs. Hausman returned home around 6 o'clock in the afternoon from the party, petitioner was not there, and she noticed people in the neighborhood of her home. [Rep. Tr. p. 25.] When Linda did not return home at 5 o'clock, her mother started to look for her, going to "everybody's" home. At 5:30 o'clock she called the police. The next morning she learned that Linda's body had been found. [Rep. Tr. p. 33.]

Between 1:30 o'clock and 2 o'clock in the morning of November 15, 1949, petitioner registered at a hotel in Ocean Park under the name of Frank Hoff. [Rep. Tr. pp. 34-36.] He stayed there three nights. [Rep. Tr. p. 41.] At 11:50 o'clock a.m., on November 17, 1949, Mr. Miller, a linen service driver, recognized petitioner on Hill Street near Fifth Street in the City of Los Angeles and followed petitioner to a bar and then told Officer Carlson at the corner that the man they were looking for was in this bar. [Rep. Tr. pp. 156, 157.] Officer Carlson took petitioner to the office of the park

foreman in Pershing Square where he searched petitioner and then called the homicide division. [Rep. Tr. p. 125.]

Mr. Miller went with petitioner and Officer Carlson to the office of the park foreman, and he testified as a witness for the defense that Officer Carlson stood Stroble facing the wall and kicked Stroble's feet out so he would be off balance during the search; that two or three times Stroble put his feet forward and the officer with his foot kicked Stroble's feet back out again, kicking Stroble's feet on the toes "and possibly it slipped off and he hit his shin once or twice," but he didn't remember if the officer kicked Stroble on the shin, that "He probably did. I cannot say. I don't remember" [Rep. Tr. pp. 158, 159]; that Officer Carlson while waiting for the homicide officers was pacing back and forth and took out his sap stick and held it under Stroble's nose and asked Stroble if he had ever seen one of these; that he didn't believe Stroble made any answer; "That is all there was and Officer Carlson put his sap stick away again" [Rep. Tr. pp. 160, 161]; that he (witness) asked Stroble if he was guilty of what he was accused and Stroble mumbled something under his breath that sounded like "I guess I am"; that the park foreman was there and had not said anything; but after Stroble said, "I guess I am," the park foreman slapped Stroble and knocked his glasses off. [Rep. Tr. pp. 163, 165, 166.]

Officers from the homicide division arrived and took petitioner ~~to the Wilshire~~ Police Station [Rep. Tr. pp. 124, 125], turned around immediately and drove to the District Attorney's office in the Hall of Justice. [Rep. Tr. pp. 130, 134.] After they had proceeded for eight or ten blocks, Officer Brennan asked petitioner how he felt and petitioner said, "Oh, I feel okay." He was asked,

"Where did you go?" and petitioner said, "Well, after that terrible thing happened I went down to the beach, down to Ocean Park. I was going to do away with myself." He was asked, "What do you mean by that terrible thing?" and petitioner said, "When the little girl got killed." Officer Brennan said, "Do you mean when you killed the little girl?" and petitioner said, "Yes, I was going down to the beach. I was going to jump in the ocean and commit suicide but I decided that I would have to pay on the other side so I might as well come back and pay on this side."

Officer Brennan asked him what he intended to do when he came back and petitioner said, "Well, I wanted to call Mr. Anderson and Mr. Rodehouse," superintendent of Van de Kamp's Bakery, before he gave himself up; that "I went into the cafeteria—or the restaurant—to get a glass of beer. I thought I would get a glass of beer and then I would call them up and then I would call the police up and give myself up." [Rep. Tr. pp. 135, 136.]

At 1 o'clock p.m., November 17, 1949, a statement from Fred Stroble was taken in the office of the District Attorney, Room 649, Hall of Justice, by Deputy District Attorney Fred N. Henderson. [Rep. Tr. p. 166.] Numerous officers were present. [Rep. Tr. p. 137.] Officer Brown testified that there was no force or threats used on petitioner, no promises of reward or hope of immunity extended to him, and the statements he made were free and voluntary. [Rep. Tr. p. 138.] It was stipulated that prior to taking a statement from petitioner he was not taken before a magistrate. [Rep. Tr. p. 143.] Nineteen persons were present when the statement was taken, and all of them were either members of the staff of the District Attorney or police officers, and there were five dif-

ferent stenographers in relays. [Rep. Tr. p. 144.] Petitioner objected to the statement being used in evidence on the grounds, (1) that no proper foundation had been laid as to its free and voluntary character, (2) that there has been a violation of due process as provided for in the Federal Constitution, and (3) that the *corpus delicti* of first degree murder has not been established by independent evidence. [Rep. Tr. pp. 150-152.] The objection was overruled. [Rep. Tr. p. 153.] Thereupon petitioner called Mr. Miller as a witness on *voir dire* examination, whose testimony we have hereinabove mentioned. [Rep. Tr. p. 156.] This evidence was presented "in furtherance of the situation with reference to the foundation not being laid with reference to the introduction of the purported statements in the confession of the defendant." [Rep. Tr. p. 151.]

The substance of the petitioner's statement read in evidence is as follows:

Petitioner was born October 7, 1881, in Austria and came to the United States in 1901. [Rep. Tr. p. 168.] He worked as a baker for Van de Kamp's for 21 years, but has not worked since 1946. [Rep. Tr. pp. 172, 173.] He has known Linda (deceased) a couple of years, ever since the Hausmans have lived at 2003 South Crescent Heights. Mrs. Hausman is his daughter and Rochelle and Fred are his grandchildren. [Rep. Tr. pp. 170-173.] Linda lived across the street and every day she came over to Rochelle's house and the children played in the back yard where they have a swing, slide, and all kinds of exercises. [Rep. Tr. pp. 174, 175.] About 3:15 o'clock on Monday, November 14, 1949, Rochelle left the house with her mother and went to a party. [Rep. Tr. pp. 177,

183.] He was left alone in the house and while sitting in the front room drinking whiskey, Linda came over and he gave her a chocolate bar. [Rep. Tr. pp. 185, 186.] They went into the children's bedroom. Linda said, "Where is Rochelle?" [Rep. Tr. p. 187.] He squeezed and kissed Linda. [Rep. Tr. p. 188.] He was sitting on the bed and she was in front of him. He put his finger under her dress and tickled her. She said, "That's not nice." [Rep. Tr. p. 189.] He put his finger about an inch inside her vagina. She didn't like it and said, "Where's Rochelle?" He told her that Rochelle was not home. She wanted to go out and play and he said, "Let's play here a little bit." He laid her on the bed on her back. Her legs were together. He said, "Let's play," and she said, "No, I'm going outside." [Rep. Tr. pp. 190, 191.] He put his hand under her dress and his finger in her vagina. She said, "I don't like that; I want to go out in the yard, and want to play outside." He lay on top of her and she started to holler. He said, "Don't holler. I don't do you no harm." She attempted to wrestle away and he held her down. [Rep. Tr. p. 192.] She didn't want to give in and started to holler. He put his hands on her throat and squeezed until she became quiet. He got up to get a coat and she started squirming around kind of lively and wanted to holler. He looked around and saw some neckties behind the dresser. [Rep. Tr. pp. 193, 194.] He wanted to make sure that she "wouldn't come back," so he took three or four steps and got a necktie, came back, put it around her neck and

tied it. [Rep. Tr. p. 195.] When he didn't notice any life and thought she was dead, he took a couple of drinks. She started moving around, so he went to the kitchen and got a hammer out of a drawer, returned to the bedroom, and took Linda off the bed, laid her on a blanket, and folded her into the blanket. He knew she wasn't dead because he talked to her. [Rep. Tr. pp. 196, 197.] He selected the left temple as the place to hit her with the hammer because if he hit her there it would be impossible for her to live any longer. [Rep. Tr. p. 198.] After he hit her on the forehead with the hammer she moved. He got scared that she was still alive, so he wrapped her up. He knew that he couldn't leave her in the room, so he dragged her in the blanket to the incinerator in the back yard. [Rep. Tr. pp. 199, 200.] He was not sure she was dead, so he went to the kitchen and got an ice pick, returned and felt where her heart was and pushed the ice pick into her body once in front and he thought twice in the back because he wanted to make sure that he hit the heart and she would not suffer. [Rep. Tr. p. 200.] He then went to the garage, put the ice pick on a shelf, and got an axe. He figured that if she was not dead he might as well finish it because the damage was done. He then hit her on the back of the head and backbone with the side of the metal part of the axe. [Rep. Tr. pp. 202, 203.] He left the axe by the incinerator and went to the kitchen where he got a knife with a blade two inches wide. He wanted to make sure Linda was dead, so he stabbed her in the back of the neck with this knife. He had seen

bullfights in Mexico and after the bull is dead a short knife is thrust right behind the bull's neck and this came to his mind about Linda because he wanted to make sure she was dead. [Rep. Tr. pp. 204-206.] He then covered her with all the cardboard boxes he could find, about three or four, went into the house, put on his coat, went to Venice Boulevard, which was about a block away, and to Ocean Park. [Rep. Tr. p. 208.] Before leaving the house he saw Linda's panties on the floor in the children's bedroom, and he put them in the incinerator. He had previously fondled Linda, which started when she was about five years of age, but this was the first time he had inserted his finger in her vagina. [Rep. Tr. pp. 212, 213.] When he was in the bedroom with Linda and she was "kinda" screaming and wrestling around, he thought about the fact and was afraid that she might tell her mother what had happened. He never had any difficulty with her before when he put his hand on her; she never said a word and sometimes smiled, but on this occasion she was so different and he knew he was up against it if he let her go, that he wouldn't be out of the house before the whole neighborhood would be after him and an officer would be there "before I would know it." [Rep. Tr. pp. 259, 260.]

During the taking of the statement petitioner stated that he was not surprised nor was he shocked when he was arrested by Officer Carlson; that he thought this officer treated him all right [Rep. Tr. p. 242]; that the officer with whom he rode from Pershing Square to the Wilshire

Police station did not mistreat him that he knew of and as far as he knew he was not abused by the officers from the Wilshire Police station to the District Attorney's Office [Rep. Tr. p. 243]; that since his arrest no one has hit, slapped or kicked him, nor to his knowledge has anyone threatened to mistreat him in any way and no one has promised him anything. He was asked, "Have you got any complaint at all the way the officers have treated you?" and answered, "No, nothing at all. Wonderful." [Rep. Tr. p. 244.]

In his defense, under his plea of not guilty as to whether he had the mental capacity to form an intent to kill, petitioner called as a witness Dr. Marcus Crahan in charge of the hospital in the county jail who testified that on or about the 17th day of November, 1949, he examined Fred Stroble. [Rep. Tr. pp. 378, 379]; that Stroble admitted to him that he had been guilty of sexual aggression on several children over a period of years; that Stroble was within the range of the sexual psychopath; that Stroble related to him that he had murdered a girl [Rep. Tr. p. 393]; that Stroble got no sexual thrill from the murder, but did it as a sexual outlet; that the murder was purely a defense mechanism; that several things went on in Stroble's mind subsequent to his sexual playing with the girl. "First, that she seemed distant to him —she was not as friendly as she had been on former occasions and he was afraid that she would tell her mother on that he would be exposed, and he had been warned the day before by his son-in-law that he would have to

leave the house, or he could not stay there any more because he was wanted by the police. When he started playing with the little girl and she screamed that set off this defense mechanism which was in the form of a reflex action in which he choked her to stifle the screams"; that the murder was conimitted as a result of panic and fear of detection and was purely incidental to his sexual intrusion upon the victim. [Rep. Tr. pp. 394, 305.]

Another physician called by the defense was Dr. Jacob Peter Frostig, who testified that Stroble related to him the details of the killing of the little girl, and said that he was frightened. [Rep. Tr. pp. 476, 485.]

Mr. Carl Palmberg was a defense witness and testified that he is a clinical psychologist [Rep. Tr. p. 529]; that he had a conversation with Stroble pertaining to the killing of the little girl [Rep. Tr. pp. 598, 599]; that Stroble said they played together in the bedroom, that he touched her, placed her on the bed; that she began to object and said, "No, I want to go outside"; that he was surprised, astonished and violently upset when she started to make a move; that he admonished her to be quiet and then she screamed very, very loud; that Stroble related that he had obtained the various instruments, namely, the ice pick, the knife, the axe and the necktie; that he was in a state of complete terror at that time because not only would the police arrest him but he could anticipate any conceivable kind of treatment from the neighbors to be around and who responded to her cries for assistance, etc. [Rep. Tr. pp. 608-611.]

ARGUMENT.

I.

Confession Was Not Obtained by Physical Abuse or Psychological Torture.

Apparently the confession about which complaint is made by petitioner is the one taken at the District Attorney's office and which was placed in evidence over his objections. Previous to making this confession petitioner, when asked by Mr. Miller, the linen service driver who caused petitioner's arrest, if he were guilty of what he was accused mumbled something under his breath which sounded like, "I guess I am." There is no contention and none may earnestly be made that Mr. Miller abused the petitioner or that the kicking of petitioner's feet by Officer Carlson or the exhibition by this officer of his sap stick caused petitioner to make this admission of guilt. It was this admission of guilt which caused the park foreman, who had nothing to do with the arrest or custody of petitioner, to slap petitioner, knocking off his glasses. This seems not to have had any after effects on petitioner because he did not even mention these so-called physical abuses to the homicide officers who arrived there later or to the District Attorney against whom petitioner lodges no complaint of physical abuse. This is all the evidence there is to support petitioner's statement on page 5 of his petition that "he evidenced a reluctance to speak, and he was then threatened, slapped, kicked, and conditioned for future interrogation.'"

This future interrogation is probably the basis for petitioner's claim of "psychological torture," namely, the fact that he was interrogated in the office of the District Attorney for approximately two hours in the presence of 19

persons consisting of members of the District Attorney's staff, police officers, and stenographers. (Pet. p. 6.) That of itself is feeble evidence of a confession being obtained by "psychological torture." From all that appears in the record the petitioner welcomed arrest and the opportunity to unburden his soul of the horrible deed which he committed on this little girl, and thought that he might as well pay here as in the Hereafter. "Everything what is. Nothing I go back. I want to give myself up anyway, but I was ready for the jump over then I thought I cannot get away from punishment, because I paid the other side. Might as well pay here too. That was my opinion. That is why I came down." [Rep. Tr. p. 245.]

We submit that petitioner confessed not because of any physical abuse or psychological torture inflicted upon him by others, but to relieve his conscience and soul of this dastardly crime. He admitted this murder not only to the District Attorney but later to several doctors (hereinabove set forth) who examined him and who were called by him as witnesses and testified to the same in an effort to prove that petitioner did not have the mental capacity to form an intent to kill.

The Supreme Court of California did not hold that defendant confessed by reason of physical abuse or psychological torture, but stated in effect that, *assuming* the confession was thus obtained, its introduction in evidence would offend the due process clause of the Fourteenth Amendment. (36 A. C. 585, 586.)

II.

Petitioner's Trial Was Not "Trial by Newspaper."

The Supreme Court of California said:

> ". . . . At the time of defendant's arrest and at the time of his trial (which began some seven weeks later) there was notorious widespread public excitement, sensationally exploited by newspaper, radio and television, concerning crimes against children and defendant's crime in particular. In these circumstances, defendant urges, it was impossible for him to obtain an unbiased jury, and due process requires a new trial even though there is no showing that any juror was actually influenced by the sensational publicity and the popular hysteria." (36 A. C. 583.)

There is very little in the record relative to the "Trial by Newspaper." Naturally the finding of the body of the little girl in its mangled and mutilated condition was a matter to receive newspaper attention, which caused notorious widespread public excitement. It was by reason of this newspaper publicity that petitioner was apprehended.

At the trial of petitioner we find in the record that on *voir dire* examination of a prospective juror he was asked if he had read or heard anything about the case and answered, "I have"; that he was asked if he had formed anything like a fixed opinion and answered, "None at all."

> "The Court: In other words, if you were accepted on this jury you would start out, we will say, from scratch, absolutely impartial?
>
> Mr. Kalbfuss: That is right.
>
> The Court: You are willing to listen to the evidence on both sides, and to decide the case according

to the evidence as you hear it in the court room and the law of California?

Mr. Kalbfuss: That is right.

The Court: Counsel may inquire." [Rep. Tr. pp. 1108, 1109.]

Counsel for petitioner then questioned Mr. Kalbfuss and counsel was apparently satisfied that petitioner would receive a fair trial regardless of the previous newspaper publicity given to the case because counsel did not pursue the subject further than that brought out by the Court as above set forth. [Rep. Tr. pp. 1108-1115.]

In his argument to the jury counsel for petitioner said:

". . . I wish to make this commentary with reference to just what has occurred *before the Court took the Bench.* I refer to the televising and the pictures taken of the jury entering the box, *and with counsel.* My own predilection is that I don't like theatricals. I don't like this added publicity in the case; and yet *we conform, we cooperate* with the men, our fellow human beings in the *vocation,* and therefore we accept it as part of what we have to expect in a case that has attracted so much attention, that has been so widely publicized, and concerning which there have been utterances over the radio, in the public press, which have unduly accentuated the importance of this case as if it were set apart from the orderly processes of the Court's day in and day out in numberless other cases; and I make that comment to you, we shall not be influenced in the slightest degree in that calm deliberation, dispassionate discussion, and arriving at a verdict under the institutions under which we live, and concerning which we are proud: the American way of the conduct of a trial." [Rep. Tr. pp. 1115(57), 1115(58).] (Emphasis added.)

From these remarks of counsel for petitioner we gather that in the absence of the judge pictures were taken by the press of the jury entering the box and that this was also televised and counsel participated and cooperated therein; that counsel in view of this added publicity to the case cautioned the jury not to be influenced in the slightest degree by it in arriving at a verdict. We must assume that the jury followed this admonition since none was requested to be given by the Court who from all appearances was not aware of what had taken place during his absence from the court room, at least there is no showing that it was brought to his attention.

After petitioner had been found guilty of murder of the first degree by the jury and was adjudged sane by the Court, petitioner substituted John D. Gray as his attorney in the place and stead of the Public Defender. [Clk. Tr. p. 67; Rep. Tr. p. 1139.] At the request of Mr. Gray the Court granted several continuances before passing sentence in order that Mr. Gray could familiarize himself with the record. [Rep. Tr. pp. 1141, 1144, 1154.] Petitioner then moved for a new trial. [Rep. Tr. p. 1162.] One of the grounds urged was that he was deprived of the presumption of innocence by the premature release by the District Attorney's Office of the details of the confession. In support thereof petitioner offered and the Court admitted as Exhibits AA in one group, namely, a copy of the 10 Star Edition of the Daily News, dated Thursday, November 17, 1949; the Sunrise Edition of the Los Angeles Examiner of Friday, November 18, 1949; the Sunset Edition of the Los Angeles Evening Herald and Express, Thursday, November 17, 1949; and pages 1 and 2 of the Los Angeles Times, Home Edition, Friday, November 18, 1949. [Rep. Tr. p. 1233.]

The trial court stated that to say that petitioner was deprived of the benefit of the presumption of innocence because the newspapers published matters concerning the case is wholly untenable and illogical.

> ". . . There is nothing to show those jurors ever saw those papers or ever read those papers. They were fully examined so far as defense counsel desired as to any knowledge or information they might have of the case. They were instructed as to the doctrine of reasonable doubt, and there is one presumption that does apply here and it is presumed the jury followed the law. As a matter of fact, there was no defense offered to the murder charge here whatsoever. The only thing in the nature of a defense which was offered was the legal argument as to whether it was a murder of the first or of the second degree, and the argument upon the hypothesis of first degree murder, as to which of the two penalties should be imposed." [Rep. Tr. pp. 1233, 1234.]

Thus, as the Supreme Court of California said, "There is no showing that any juror was actually influenced by the sensational publicity and the public hysteria." And further, "We can also assume that it was improper to allow the taking of news photographs or televising of scenes in the courtroom; but there is no indication that the jury's verdict was influenced by the taking of the pictures or the televising of courtroom scenes." (36 A. C. 583, 584.)

III.

Petitioner Was Not Denied Due Process of the Law Under the Fourteenth Amendment by Not Being Taken Immediately Before a Magistrate.

It appears in the record that Officer Brennan first saw petitioner at approximately 12:30 o'clock on November 17, 1949, at the Wilshire Police station [Rep. Tr. p. 129], at which time petitioner was in custody of Officer Carlson; that petitioner was immediately taken in a car to the District Attorney's Office [Rep. Tr. p. 130]; that petitioner did not request to communicate with any member of his family or with a lawyer, or ask to see or telephone to Attorney John Gray [Rep. Tr. pp. 131, 132]; that Officer Brennan had knowledge at the time they started on the trip to the District Attorney's Office that a complaint charging Stroble with murder had been filed in the Municipal Court on the preceding day and a warrant of arrest had been issued by a judge of the Municipal Court before whom a complaint had been filed [Rep. Tr. pp. 132, 133]; that he did not take Stroble to the Municipal Court before going to the District Attorney's Office and that the Municipal Court is located on the 7th floor and the District Attorney's Office is on the 6th floor in the Hall of Justice, the same building. [Rep. Tr. p. 134.]

The admitted fact that petitioner was taken to the District Attorney's Office instead of being taken immediately before a magistrate did not render his confession involuntary and its introduction in evidence a violation of the due process clause of the Fourteenth Amendment.

The Supreme Court of California held that such procedure was in violation of Section 8 of Article 1 of the State Constitution, which provides that:

> ". . . When a defendant is charged with the commission of a felony, by a written complaint sub-

scribed under oath and on file in the court within the county in which the felony is triable, he shall, without unnecessary delay, be taken before a magistrate of such court."

Also, that it was in violation of Section 825 of the Penal Code, which provides that:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; . . . ."

Also, that it was in violation of Section 848 of the Penal Code, which provides that:

"An officer making an arrest, in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law."

Section 814 of the Penal Code prescribes the form of warrant and it commands that the accused be forthwith arrested and brought before the magistrate who issued the warrant or before the nearest or most accessible magistrate in the county. Section 145 of the Penal Code makes it a misdemeanor to wilfully delay taking the arrested person before a magistrate having jurisdiction. (36 A. C. 587, 588.) The Supreme Court of California said that the violation of petitioner's constitutional and statutory rights immediately after his arrest appears not to have affected the outcome of defendant's trial. (36 A. C. 589.)

The Supreme Court of the United States in *Lisenba v. People of the State of California*, 314 U. S. 219, 62 S. Ct. 280, 291, where the same matter was under consideration, said:

"Does the questioning on May 2nd, in and of itself, or in the light of his earlier experience, render

the use of the confessions a violation of due process? If we are so to hold it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials. There is less reason for such a holding when we reflect that we are dealing with the system of criminal administration of California, a quasi-sovereign; that if federal power is invoked to set aside what California regards as a fair trial it must be plain that a federal right has been invaded."

IV.

District Attorney's Refusal to Permit Counsel to See Petitioner While Confession Was Being Taken Did Not Violate Petitioner's Constitutional Right to Counsel or Due Process of Law.

Attorney John D. Gray was called as a defense witness and testified that he is attorney of record for defendant on another sex offense charge; that on November 17, 1949, he received a telephone call from Mr. Hausman who told him to go to the District Attorney's Office and see what he could do; that he arrived at the District Attorney's office at 1:43 p.m. [Rep. Tr. pp. 420-423]; that he asked the girl at the desk if he could see Mr. Alexander (Deputy District Attorney) and was told that Mr. Alexander was in conference and could not see him [Rep. Tr. p. 425]; that he gave his name to the girl and told her that he was Stroble's attorney; that he also asked for Mr. Henderson and was told that Mr. Henderson was in confer-

ence; that he told the girl that he demanded the right to see Stroble and she told him that he could not see Stroble [Rep. Tr. p. 426]; that on several occasions he asked the girl if they knew he was there and she told him that they did; that he saw Stroble when they brought him out of the office that afternoon and took him to Dr. Crahan's [Rep. Tr. p. 428]; that Stroble was rushed by him and taken to the elevator; that he then saw Mr. Alexander in the corridor and asked him why he had not been allowed to see Stroble; that Mr. Alexander told him that they were in conference and couldn't be interrupted; that Mr. Alexander introduced him to Mr. Barnes, Assistant District Attorney; that he asked Mr. Barnes why he hadn't been allowed to see Stroble [Rep. Tr. p. 429]; that Mr. Barnes told him that they had been in conference and couldn't be interrupted; that he said to Mr. Barnes, "Well, I have a right to see him," and Mr. Barnes said, "No, you don't have any such right"; that at approximately 9:30 o'clock that evening he saw Mr. Stroble in the attorney's room in the county jail [Rep. Tr. p. 430]; that on the night of November 16, 1949, at the Wilshire Police Station, when he was there with Mr. Hausman, he told Mr. Henderson and Mr. Alexander that he represented Mr. Hausman [Rep. Tr. pp. 430, 431]; that he believed it was after Stroble's arrest although it may have been that night that he told Mr. Henderson and Mr. Alexander that he did not represent Stroble on the murder charge and under no circumstances would he represent Stroble on the murder charge [Rep. Tr. pp. 432, 433]; that he remembered making the statement that Mr. Hausman had sent him down there to talk to Stroble and that if Mr. Hausman was satisfied that Stroble had committed this act he would not defend him; that he never appeared as attorney of record in the murder case [Rep. Tr. p. 435]; that he said he

would not defend Mr. Stroble, that he had a civil practice, didn't defend criminal matters ordinarily, other than a few minor violations, but that he would associate an experienced counsel if Mr. Hausman so desired [Rep. Tr. p. 438]; that Mr. Hausman had told him that he had been informed that Stroble had been picked up and taken to the District Attorney's Office and asked him to go there and do what he could [Rep. Tr. p. 439]; that he went to the District Attorney's Office to advise Stroble of his constitutional rights [Rep. Tr. p. 440]; that he remembered Mr. Alexander said to him, "John, you know that you had no intention of defending Stroble and that you told us that the night before and the day Stroble was picked up," and that in reply he said, "Well, Alexander, I probably would have said anything to you just to get in to see Stroble." [Rep. Tr. p. 441.]

Chief Deputy District Attorney S. Ernest Roll testified that in the afternoon of November 17, 1949, at the entrance to the District Attorney's Office, he had a conversation with Mr. Gray in the presence of Mr. Alexander [Rep. Tr. pp. 769, 770]; that Mr. Gray said that he did not represent Fred Stroble, that he represented Mr. Hausman; that the Hausmans had heard that Stroble had confessed and he was there just to find out from Stroble if this was true. [Rep. Tr. p. 771.]

Mr. John Barnes, Assistant District Attorney, testified that in the afternoon of November 17, 1949, Mr. Roll, Mr. Alexander and Mr. Gray came into his office [Rep. Tr. pp. 775, 777]; that Mr. Gray said, "Where is Mr. Stroble?" or, "I want to talk to Mr. Stroble"; that he said, "I don't have Mr. Stroble, he is in the custody of the Police Department. May I ask you, have you been employed to represent Mr. Stroble in this matter?"; that

Mr. Gray said, "No" [Rep. Tr. p. 777]; that he asked Mr. Gray whom he represented and Mr. Gray said Mr. Hausman, the son-in-law; that Mr. Gray said that he just wanted to see Mr. Stroble and ask him whether or not he committed the murder in order to report to Mr. Hausman, because Mr. Hausman had instructed him that if Stroble had committed the murder he (Hausman) wanted absolutely nothing to do with Stroble [Rep. Tr. pp. 779, 780]; that he said to Mr. Gray, "He has completely and voluntarily confessed the crime. I was there. I heard it. He has told all of the details of what he did. Gray, you can take my word for it and so report to your client. Would you like to use my telephone?"; that Mr. Gray said he would and he left Mr. Gray in the office alone; that in about five minutes Mr. Gray came out of the office and thanked him; that the conversation with Mr. Gray was within ten minutes after the conclusion of Stroble's statement, along about 3:30 o'clock in the afternoon [Rep. Tr. p. 780]; that Mr. Gray asked why he hadn't been allowed to see Stroble and said that he had a right to see him and that he told Mr. Gray that he was not the man's lawyer and had no such right. [Rep. Tr. p. 782.]

Officer Tullock testified that on the night of November 16, 1949, in front of Hausman's home, Mr. Gray said that he did not and will not represent Stroble in the murder case; that his client is Hausman; that he just wanted to satisfy himself that Stroble committed the murder. [Rep. Tr. pp. 782, 783.] The same testimony was given by Officer Brennan and it was stipulated that if Mr. Alexander and Mr. Henderson were called as witnesses they would give the same testimony. [Rep. Tr. pp. 783-786.] The same testimony was given by Inspector Donahoe.

[Rep. Tr. pp. 789-790.] This witness also testified that he saw Mr. Gray in the hallway while Stroble was in the office of the District Attorney [Rep. Tr. pp. 790, 791]; that Mr. Gray asked if Stroble had confessed and he told Mr. Gray that Stroble was making a complete statement which would take probably another 30 minutes or more; that he asked Mr. Gray if he was going to represent Mr. Stroble and Mr. Gray said he was not, but his purpose for being there was merely to hear from Stroble's lips the truth so that he could relay it back to the Hausmans; that he told Mr. Gray that he could believe him because they had not told him any falsehoods previously, that he could go back and tell the Hausmans that Mr. Stroble was making a complete and voluntary confession to the effect that he solely was responsible for the murder of the child [Rep. Tr. p. 792]; that Mr. Gray said he would rather talk to Stroble himself; that he told Mr. Gray that in that case if he would remain there until after the statement was completed and then see Mr. Alexander or Mr. Henderson as to when he would be able to see Stroble [Rep. Tr. p. 793]; that he told Mr. Gray that Stroble was giving a complete confession and said to him, "Why don't you go on home and come back tomorrow and let's do this thing right?"; that Mr. Gray said he was going to remain there until he did get to see Stroble. [Rep. Tr. p. 796.]

The Supreme Court of California said:

> "It is also apparent that defendant should have been allowed to see Mr. Gray, who was present at the request of defendant's son-in-law, a 'relative of such prisoner' (Pen. Code, sec. 825). We disregard as a quibble the suggestion of the People that their officers had no duty to let Mr. Gray see defendant

because Gray did not wish to advise or represent defendant but was present because of mere curiosity." (36 A. C. 588.)

Section 825 of the Penal Code provides that any attorney at law entitled to practice in the courts of record of California may at the request of the prisoner or any relative of such prisoner visit the person so arrested and that any officer having charge of the prisoner so arrested who wilfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor.

The Supreme Court of California further said:

". . . As the situation actually developed, however, it became obvious that defendant did not wish, or was not able to remain silent. After he had consulted with Mr. Gray and with attorneys from the public defender's office defendant continued repeatedly to make detailed confessions. Each of these confessions appears to be an attempt by defendant, to the best of his ability, to recount the entire truth as to the killing including his state of mind at the time. In these circumstances the violation of his constitutional and statutory rights immediately after his arrest appears not to have affected the outcome of defendant's trial." (36 A. C. 589.)

Petitioner cites *Malinski v. New York*, 324 U. S. 401; *Watts v. Indiana*, 338 U. S. 49; *Turner v. Pennsylvania*, 338 U. S. 62, and *cf. McNabb v. United States*, 318 U. S. 332; *Haley v. Ohio*, 332 U. S. 596, and *Upshaw v. United States*, 335 U. S. 410, in support of his statement that the conduct of the officers in not taking petitioner promptly before a magistrate and in denying counsel the right to see him until hours after his arrest violated that fundamental fairness in the proceedings taken against him which he describes as the due process of law. (Pet. p. 18.)

The case of *Malinski v. New York* (*supra*) is authority that a coerced or compelled confession may not be used to convict a defendant and that the judgment of conviction will be set aside though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. However, it is not authority for the claim that a confession is coerced and involuntary solely because a defendant following his arrest is not promptly taken before a magistrate and/or where counsel has been denied the right to see him until hours after his arrest. Malinski's first confession was held to be coerced and involuntary because of the treatment he had received at the hands of the officers and the prosecutor's statement to the jury that Malinski was not hard to break and knew that the cops were going to break him down.

In *Watts v. State of Indiana, supra* (338 U. S. 49), the defendant was arrested on November 12, 1947, as a suspected perpetrator of an alleged criminal assault. Later that day a woman was found dead in the vicinity of this occurrence under conditions suggesting murder in the course of an attempted criminal assault. Defendant was taken from the county jail to State Police Headquarters where he was questioned by officers in relays from about 11:30 o'clock that night until 2:30 or 3 o'clock the following morning, again from 5:30 o'clock in the afternoon until 3 o'clock the following morning, by a relay of six to eight officers. The interrogation was pursued on the 14th, 15th, 17th and 18th when he finally made an incriminating statement. The statement did not satisfy the prosecutor who had been called in and he took defendant in hand and obtained a more incriminating document. For the first two days defendant was kept in solitary confinement in a cell "aptly called 'the hole.'"

No such circumstances exist in the case at bar. The statement made by petitioner was the expression of free choice, to tell all and thereby unburden his conscience which hurt him after reflecting what he had done to this child and which had far exceeded his criminal acts previously committed upon other children.

In *Turner v. Commonwealth of Pennsylvania, supra* (338 U. S. 62), the defendant was questioned for long hours over a period of days and persistently denied any knowledge of the murder. He was not permitted to see friends or relatives during the entire period of custody and it was not until five days after his arrest that he was brought before a magistrate for preliminary hearing.

That is not the situation in the case at bar. Petitioner was arrested on November 17, 1949 [Rep. Tr. p. 156], and on the following day at the hour of 10 o'clock he was arraigned in the Municipal Court at which time the City Public Defender was appointed to represent him and was given a copy of the statement taken from petitioner. [Rep. Tr. pp. 1079, 1080.] Attorney Gray had seen petitioner the previous evening at approximately 9:30 in the attorney's room in the county jail. [Rep. Tr. p. 430.]

We note in the concurring opinion of Mr. Justice Douglas in *Watts v. State of Indiana, supra* (338 U. S. 49), that he advocates the outlawing of any confession obtained during the period of unlawful detention because, he states, the procedure breeds coerced confessions, that it is the root of the evil, and that it is the procedure without which the inquisition could not flourish in the country.

In other words, the rule applied by the Supreme Court in Federal cases (*McNabb v. United States*, 318 U. S. 332) should be applied to State cases as well. This, in our opinion, would be supplanting criminal administration by the States, quasi-sovereigns, and making it solely a Federal matter. It seems to us that the circumstances of each case under which the confession was made should govern as to its voluntariness and not just the fact that it was given while defendant was being unlawfully detained.

According to the opinion of the Supreme Court of California, attorney Gray should have been allowed to see petitioner while he was being interrogated by the District Attorney. Section 13, Article 1, of the Constitution of California provides that, "In criminal prosecutions, in any court whatever, the party accused shall have the right . . . to appear and defend, in person and with counsel . . ." The Supreme Court of California did not say that this provision of the Constitution was violated, but referred only to Section 825 of the Penal Code.

The Sixth Amendment of the Constitution of the United States provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . . to have the assistance of counsel for his defense."

In *Carter v. People of the State of Illinois*, 329 U. S. 173, 67 S. Ct. 216, 218, the Supreme Court of the United States, in speaking of the right of counsel, said, "And the need for such assistance may exist at every stage of the prosecution, from arraignment to sentencing," under the due process clause of the Fourteenth Amendment. The

court further said, "Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt."

Therefore, we have not in the instant case a denial of a constitutional right of counsel. Nor do we have in the proceedings taken against petitioner a denial of that fundamental fairness guaranteed under the due process clause of the Fourteenth Amendment.

In *Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 338, it is said:

> "The Constitution and statutes and judicial decisions of the commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice; acknowledged *semper ubique et ab omnibus* (Otis v. Parker, 187 U. S. 606, 609, 23 S. Ct. 168, 47 L. Ed. 323), whenever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

V.

Trial Court Did Not Remove Petitioner's Counsel.

Petitioner was represented at the trial by Deputies Public Defender Al Matthews and John J. Hill. After the trial on petitioner's plea of not guilty was concluded and the jury had rendered a verdict of guilty of murder of the first degree and at the commencement of the trial on petitioner's plea of not guilty by reason of insanity, the trial court called the attorneys into his chambers and requested the Public Defender, Mr. Cuff, to be present. The court accused Mr. Matthews of loud talking and of unprofessional conduct in furnishing to certain professors, teachers and lecturers at the University of Southern California copies of the doctors' reports in violation of the admonition of the court when releasing the reports to counsel that they should be kept secret and confidential. [Supp. Rep. Tr. p. 24.] The trial court said, "This discussion here is merely the reason why I believe that Mr. Cuff should be present in the court room, so that we don't have any irregularities." [Supp. Rep. Tr. p. 33], and "to see that this trial is conducted in a manner in which I believe trials should be conducted, in a calm, dignified manner, in accordance with the law and in accordance with the ethics of the legal profession is what I am interested in." [Supp. Rep. Tr. p. 35.] Mr. Cuff and Mr. Hill, with Mr. Matthews present, then carried on the defense at petitioner's trial on his plea of not guilty by reason of insanity.

The Supreme Court of California, in passing on this matter said:

> ". . . Defendant's right to counsel does not include the right to be represented by a particular deputy public defender. (See People v. Manchetti (1946),

29 Cal. 2d 452, 458 (175 P. 2d 533).) The record sustains defendant's assertions that Mr. Matthews was required to retire from the active representation of defendant because Mr. Cuff and the trial judge disapproved of certain things he had done in connection with the case; it does not sustain defendant's charge that thereafter he was not properly and adequately represented." (36 A. C. 592.)

We submit that this matter invokes no Federal question.

VI.

Trial Court Did Not Fail to Take Evidence at the Trial of Petitioner's Plea of Not Guilty by Reason of Insanity.

After the jury had rendered a verdict on defendant's plea of not guilty they were ordered to return on the following day at 9:30 a. m. because of the two stages of the trial. [Rep. Tr. p. 995.] At 9:30 a. m., the following day, Mr. Matthews accepted the stipulation that the jury in determining the issue of insanity may consider all the testimony theretofore received on the issue of not guilty with the same force and effect as though it had been reproduced before the jury on the question of insanity. [Rep. Tr. p. 996.] After the defendant waived trial by jury as to this issue Mr. Hill submitted the cause as set forth in said stipulation. It was further stipulated that the reports of all the doctors, both court-appointed and those selected by the defense, may be considered as evidence the same as though the doctors had been sworn and testified in the case. [Rep. Tr. p. 1001.]

Although the reports of the doctors were objectionable as hearsay evidence (see Section 1927, Penal Code), there was no objection to their admission in evidence and consideration by the trial court. In fact it was stipulated that

they could be considered by the court in determining the issue of defendant's sanity. Furthermore, insofar as the issue of sanity was concerned defendant was presumed to be sane. (Penal Code, Sec. 1026.) On the trial of such issue the prosecution may rest its case on the presumption of sanity (*People v. Williams*, 184 Cal. 590, 593), and shift the burden of introducing evidence upon the defendant. (*People v. Hickman*, 204 Cal. 470, 477, 478.) By the prosecution stipulating that all of the doctors' reports may be admitted and considered by the trial court in passing upon the issue of insanity relieved the defendant of this burden and was to defendant's benefit, especially where he had no other relevant evidence to submit on the subject.

Petitioner called as witnesses at the trial under his plea of not guilty Doctor Marcus Crahan [Rep. Tr. p. 378] who testified that petitioner was oriented in all fields and was rational and logical in all matters [Rep. Tr. p. 410]; Doctor Jacob Peter Frostig [Rep. Tr. p. 476] who testified that he thought petitioner had the mental ability to intend to put his hands around the child's throat and squeeze [Rep. Tr. p. 517], that petitioner had the mental ability to have the motive to kill the child [Rep. Tr. p. 518], and that petitioner's intent was to kill her in order to quiet her [Rep. Tr. p. 520]; and Doctor Carl G. G. Palmberg [Rep. Tr. p. 529], who testified that it was his opinion that petitioner "did not have the mental capacity to do that planning, premeditating or deliberating." [Rep. Tr. p. 634.]

Petitioner's statement on page 23 of his Petition that "Thus the stipulation regarding the evidence introduced on the not guilty plea is of no help to the court in the sanity stage of the trial, no evidence of sanity or insanity having been introduced," is obviously erroneous.

Conclusion.

This concludes our response to the petition for a writ of certiorari. When the record is examined relative to the matters complained of, and the opinion of the Supreme Court of California is considered, we submit that no rights guaranteed by the Fourteenth Amendment of the Constitution of the United States were violated and that the judgment should stand as it is.

Wherefore, we sincerely believe that the writ prayed for herein should be denied.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of June, A. D. 1951.

6-20-51—60